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# **Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts**

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# **Indigeneity and the Likelihood of Imprisonment in Queensland's Adult and Children's Courts**

## **Abstract**

Australian research on Indigenous sentencing disparities of the standard of international work is somewhat recent. Contrary to expectations based on international research, Australian studies generally have *not* found Indigenous offenders to be treated substantively more harshly than non-Indigenous offenders in similar circumstances. However, this research has primarily focused on adult higher courts, with little attention to lower courts and children's courts. In this paper, we examine whether Indigeneity has a direct impact on the judicial decision to incarcerate for three courts (adult higher, adult lower, children's higher court) in Queensland. We found no significant differences in the likelihood of a sentence of incarceration in the higher courts (adult and children's). In contrast, in the lower courts, Indigenous defendants were more likely to be imprisoned than non-Indigenous defendants when sentenced under statistically similar circumstances.

**Key words:** Indigenous status, sentencing, disparity

## **Introduction**

Official court data across Australia suggest disparate sentencing outcomes by Indigenous status. For example, in Queensland's adult Magistrate's and children's courts, Indigenous defendants receive significantly more custodial orders than non-Indigenous offenders (Cunneen et al. 2005: 53-56). Similarly, in New South Wales, South Australia and Western Australia, Indigenous adult offenders are more likely to be sentenced to prison (see Baker 2001 [NSW]; Castle and Barnett 2000 [SA]; Loh and Ferrante 2003 [WA]). Understanding the source of this apparent sentencing disparity is vital for researchers, policy-makers and those working in the criminal justice system. While existing data may suggest Indigenous inequality, court statistics only provide "baseline" differences between the sentences of Indigenous and non-Indigenous offenders; that is, differences before taking into account other relevant factors (e.g. crime seriousness, criminal history) that may mitigate or aggravate sentences. This paper examines whether Indigeneity has a direct effect on Queensland judicial decisions to incarcerate after adjusting for other relevant sentencing factors.

## **Explaining Disparity in Sentencing**

Three key hypotheses are used to explain differences in sentences between minority and non-minority defendants. These are: 1) differential involvement; 2) negative discrimination; and 3) positive discrimination.

First, according to the differential involvement hypothesis, existing differences in legally relevant factors between Indigenous and non-Indigenous offenders may mediate the relationship between Indigeneity and sentencing. For example, disparate sentences may simply be a response to differences in the criminality of Indigenous and non-Indigenous defendants. Thus, there may be no Indigenous discrimination in sentencing once other relevant sentencing variables are controlled (Weatherburn et al. 2003).

Second, the negative discrimination thesis argues that Indigenous status directly impacts sentencing, resulting in harsher outcomes. In other words, base-line sentencing disparity between Indigenous and non-Indigenous defendants in government court data is not attributable to differences in other influential sentencing determinates (e.g. past and present offence seriousness), but a result of more rigorously applying the law to a group that poses a 'threat' to the dominant power group (e.g. 'whites'). This argument, with its reliance on the

concept of ‘threat’, originated in the conflict school of criminological thought in the United States. According to this argument sentencing discrimination is inevitable for minority group defendants because they constituted the greatest ‘threat’ to the dominant group (Peterson and Hagan 1984; Hawkins 1987; Steen et al. 2005).

More recently, the negative discrimination hypothesis has been contextualised within the theoretical framework of focal concerns. Research suggests that sentencing decisions are guided by a number of judicial focal concerns, particularly offender blameworthiness and harm caused by the offence, community protection, and practical constraints presented by individual offenders, organisational resources, political and community expectations (Steffensmeier et al. 1998: 766-767). Offender characteristics, such as Indigeneity, may increase judicial assessments of blameworthiness or culpability, as well as judicial perceptions of increased future risk to the community. Organisational constraints may create (or amplify) such perceptions by pressuring judges to make decisions with limited information and time, leading to judicial reliance on ‘perceptual shorthand’—or stereotypical attributions of increased threat and criminality to minority group offenders—to determine sentences (Steffensmeier et al. 1998: 768).

If, for example, Indigenous status carries with it criminal stereotypes, then judges may rely on that status characteristic as an indicator of blameworthiness and risk. Thus, the attribution of increased threat and criminality to Indigenous offenders produces sentencing differentials, rather than some grand judicial plan aimed at keeping Indigenous people in a subordinate societal position because of the threat they pose to the Anglo–Australian power group. Although this is arguably an important distinction between conflict and focal concerns perspectives (Everett and Wojtkiewicz 2002: 193–194), the use of offender stereotypes in individual-level sentencing decisions is an example of macro-social asymmetrical power relations (Ulmer and Johnson 2004:144–145).

Finally, the positive discrimination thesis suggests that minority group statuses may mitigate sentencing outcomes. Unlike the conflict perspective, the focal concerns approach also allows us to recognise that a defendant’s Indigeneity may operate as a mitigating influence on sentencing decision-making because it may trigger attributions about the causes or reasons for offending and broader social and policy expectations (Jeffries and Bond 2009: 54-55).

There are at least two reasons, flowing from the focal concerns perspective, for expecting more favourable sentencing outcomes for Indigenous offenders in Australia. First, sentencing outcomes are known to be affected by offender constraints, such as the ability to ‘do time’ (Steffensmeier et al. 1998: 767-768). In comparison to the non-Indigenous population, Indigenous people tend to experience higher levels of social and economic disadvantage and associated poverty, victimisation, substance abuse and ill health. Potentially these differences in offender constraints could mitigate sentence severity and lead to more lenient outcomes for Indigenous defendants. Second, community and political constraints may place pressure on judges to reduce sentence severity for Indigenous defendants (Jeffries and Bond 2009). For example, since the *Royal Commission into Aboriginal Deaths in Custody*, there has been community concern about the treatment of Indigenous peoples in the criminal justice system. Additionally, Australian governments (including Queensland via *The Aboriginal and Torres Strait Islander Justice Agreement*) have made a public commitment to reduce Indigenous over-representation. Therefore, we might expect to find that, when being sentenced under similar circumstances, Indigenous offenders are sentenced more leniently than their non-Indigenous counterparts.

## **Prior Research on Sentencing Disparities**

### *Latino and African American Sentencing*

Empirical research on sentencing disparities has been dominated by North American studies of disparities between whites and African-Americans, and more recently, between whites and Latin-Americans (Spohn 2000: 17). Overall, prior research shows that after adjusting for other relevant sentencing factors (particularly current and past crime seriousness), initial base-line racial/ethnic sentencing disparity (as seen in court statistics) in the United States for both adult and youth defendants reduces, but does not *always* dissipate completely. This means that while some of the initial disparity in sentencing between racial/ethnic groups can be explained by the *differential involvement* thesis, there is support for the *discrimination* hypothesis (that is, race/ethnicity has an effect on sentencing outcomes, independent of other relevant factors). Further, U.S. research indicates that net of other sentencing factors, African-American and/or Latin-American offenders are generally more likely than their

‘white’ counterparts to be sentenced to prison (Mitchell 2005; Spohn 2000; Engen et al. 2002).

### *Indigenous Sentencing*

There have only been two studies outside of Australia concerned with the impact of Indigenous status on the decision to imprison. Munoz and McMorris’ (2002) North American research showed that although offence seriousness reduced the effect of adult Indigenous status on imprisonment, Indigenous American offenders were more likely to be sentenced to prison. This result provides support for both the differential involvement and negative discrimination theses. In contrast, Canadian analyses of Indigenous versus non-Indigenous youth sentencing suggest that Indigenous status may not directly impact the likelihood of incarceration. After controlling for offence seriousness and prior criminal history, Latimer and Foss (2005: 487) did not find a direct relationship between Indigenous status and the likelihood of young people receiving a custodial sentence. Base-line differences disappeared after accounting for other relevant sentencing determinants, suggesting a differential involvement explanation.

In Australia, sentencing research provides support for the differential involvement, negative and positive discrimination hypotheses. Snowball and Weatherburn (2006) provide the first attempt in Australia to systematically investigate, using methodologically rigorous techniques, the direct impact of Indigenous status on adult sentencing. Using a sample of adult offenders (with legal representation, no past prison sentence, and not on remand for another offence) sentenced in New South Wales’ courts (higher and lower combined), Snowball and Weatherburn (2006) found no significant difference between Indigenous and non-Indigenous offenders in the likelihood of imprisonment, after controlling for a range of other sentencing factors. This result suggests differential involvement in criminality explains sentencing outcomes: Indigenous status played little or no independent role in sentencing at least for this group of defendants.

When Snowball and Weatherburn (2007) included adult offenders previously imprisoned and who appeared without legal representation into their analysis, results generally supported the differential involvement thesis. The higher likelihood of imprisonment for Indigenous offenders in New South Wales was mostly explained by differences in current and past offending and breaches of non-custodial sanctions (Snowball and Weatherburn 2007: 287).

However, a small yet direct negative relationship between Indigenous status and sentencing remained, with Indigenous offenders slightly more likely than their non-Indigenous counterparts to be incarcerated (Snowball and Weatherburn 2007: 286).

In contrast, Jeffries and Bond's (2009) analysis of Indigenous and non-Indigenous adults sentenced in South Australia's higher courts found that Indigenous offenders were less likely than non-Indigenous defendants to be sentenced to imprisonment, independent of key sentencing variables. Indigenous status, in this case, had a direct yet positive effect on sentence severity. Consistent with a focal concerns argument, this pattern suggests that Indigeneity may be seen as a potential mitigating factor due to the historical and social circumstances surrounding Indigenous offenders.

Using higher court data from Western Australia, Bond and Jeffries (2010) examined whether adult Indigenous and non-Indigenous women were equally likely to receive a sentence of imprisonment for comparable offending behaviour and histories over a nine year period (1996-2005). Indigenous women were found, on average, to be less likely than their non-Indigenous counterparts to receive a prison sentence. Thus, again, Indigenous status was again found to have a direct yet positive impact on sentencing (although this conclusion should be made cautiously as remand status could not be included in the analysis). Like the arguments made in the South Australian context, the findings in this jurisdiction are indicative of 'a degree of judicial cognisance ... around the special circumstances of Indigenous women' which might mitigate sentencing outcomes (Bond and Jeffries 2010: 7).

The only published Australian work in the last 15 years on youth sentencing suggests differential involvement may explain initial base-line differences in the likelihood of detention by Indigenous status. Gallagher and Poletti's (1998) New South Wales study compared the sentencing outcomes of Indigenous/Anglo youth pairs matched on principal offence type and seriousness, prior criminal record, plea, number of sentenced counts, police bail outcomes and age. No differences between the Indigenous and Anglo pairs in the likelihood of detention were found.

### *Limitations of Past Indigenous Sentencing Research*



There are few studies concerned with exploring the relationship between Indigenous status and the decision to imprison and prior research is limited in three ways. First in Australia, research has primarily focussed on the higher courts (Jeffries and Bond 2009; Bond and Jeffries 2010) or court jurisdictions have been amalgamated (Snowball and Weatherburn 2006, 2007). Given that the overwhelming majority of criminal defendants have their cases finalised in the lower courts, a better understanding of sentencing processes at this level is required (Australian Institute of Criminology 2009: 76-77). Second worldwide, analysis of Indigeneity and youth sentencing is rare (see Latimer and Foss 2005; Gallagher and Poletti 1998). Third, Australian research suggests locale differences in Indigenous sentencing between jurisdictions (cf. Snowball and Weatherburn 2006, 2007; Jeffries and Bond 2009; Bond and Jeffries 2010). Therefore, researchers need to consider how Indigenous status impacts sentencing in other Australian jurisdictions.

### **The Current Study**

This study addresses gaps in prior research on Indigeneity and sentencing by exploring the direct effect of Indigenous status on the decision to incarcerate in the additional jurisdiction of Queensland, at higher court levels for both adults and children and the adult Magistrate's courts after adjusting for a comprehensive set of other sentencing factors. We examine two key research questions:

- Does Indigeneity have a direct effect on the decision to imprison in Queensland's higher courts (i.e. District and Supreme) for adult and youth defendants once other key sentencing factors are controlled?
- Does Indigeneity have a direct effect on the decision to imprison in Queensland's lower adult courts (i.e. magistrates) once other key sentencing factors are controlled?

### **Data and Methods**

In this study, we use case-level data compiled by Queensland's Department of Justice and Attorney General. Our analyses are based on three samples of cases sentenced between June 2006 and June 2008 in the adult Magistrate's Court, higher adult and children's courts (i.e. District and Supreme Court). Offenders convicted of offences with mandatory life imprisonment were excluded.

The Department of Justice data provide information on sex, Indigenous status, age at the time of sentencing, offence seriousness, final plea, and sentence type. However, other important information is not available (such as remand status, criminal history, social background information). Consequently, for the adult courts, we selected two random samples of offenders stratified equally by sex and Indigenous status to allow for further data collection from sentencing transcripts (higher courts) and criminal history files (adult courts). We drew on a sample of 1,000 cases from the adult Magistrate's Courts, and 1,200 from the adult higher courts (District and Supreme Courts). We sampled more cases in the adult higher courts to address the potential attrition in the data collection process, namely locating sentencing transcripts. Information on Magistrate's Courts sentencing hearings were not accessible. Due to the small numbers of defendants processed in the children's higher courts, the full population (n=703) for the two-year period was used.

Due to missing data, our final samples consist of 1,179 cases (or 98.3% of the original sample) in the adult higher court, 970 (97%) in the adult Magistrate's Court, and 695 (98.9%) from the children's higher courts.

### ***Measures***

*The dependent variable* of interest in this study is the decision to imprison. We use a dichotomous measure of a prison (or detention) sentence, comparing those who received sentences of imprisonment (or detention) to those who received any other sentencing outcome.

We collected information on four groups of independent variables for our analysis of the relationship between Indigenous status and the decision to imprison. (Their coding is summarised in Table 1).

[INSERT TABLE 1 ABOUT HERE]

(1) *Offender characteristics*. Indigenous status is self-reported in Queensland. Offenders in the Department of Justice database who were listed as "unknown" or "refused" were dropped from the analyses. (The proportion of "sentencing events" where the Indigenous status of the offender was unknown or refused was between 6.5% to 8.0% in the adult

data and around 3.0% in the higher children's court data.) All other offenders were coded "non-Indigenous". In addition to Indigenous status, we also control for sex and age at sentencing.

- (2) *Case and Offending Characteristics.* Past research shows that prior criminal history and current offence seriousness are the strongest predictors of sentencing outcome (Steffensmeier et al. 1998). In the analyses of the adult offenders, criminal history was measured as a standardised additive index of number of prior convictions, number of prior convictions in the same offence category as the current sentenced offence, and number of prior terms of imprisonment in the jurisdiction of Queensland. For the young offenders, our ability to access criminal history files was constrained by ethical concerns around the study of a vulnerable population. Thus, criminal history information was coded from judicial sentencing transcripts.

The seriousness of the principal offence<sup>1</sup> was measured using the National Offence Index (NOI). Developed by the Australian Bureau of Statistics, the NOI ranks all offence classifications contained within the Australian Standard Offence Classification System in order of seriousness from 1 to 155 with 1 being the most serious and 155 being the least serious. We then reverse coded the score for the principal offence to make the analyses more readable, so that higher scores indicated more serious offences. The presence of multiple conviction counts was also used in our analyses as an additional measure of offence seriousness.

Type of plea and offender's remand status were also included. Refusal by police and previous judicial actors to release offenders back into the community may influence judges' perceptions of risk (Jeffries et al. 2003). Prior research suggests that entering a guilty plea provides some indication of remorse, saves court time and money, and thus may reduce sentence severity (White and Perrone 2005).

- (3) *Context of the offence.* Past studies suggest that the circumstances in which the offence occurred may impact on judicial perceptions blameworthiness and future risk posed by the offender (Ashworth 1995). For example, offenders who have clearly engaged in a level of criminal premeditation may be held more culpable for their actions than those who act 'in the heat of the moment' (Ashworth 1995). Further, offences committed in

public may be perceived as more serious than those committed ‘behind closed doors’ in the privacy of peoples’ homes (Jeffries et al. 2003). The role played by an offender in the crime may impact on sentencing with sole offenders or key protagonists being perceptually more blameworthy than offenders who have played an ancillary role (White and Perrone 2005: 155). We were only able to collect evidence of premeditation, offence location, offenders’ role, and co-offenders for the higher courts. This information was coded from the District and Supreme Court sentencing transcripts. In Queensland’s Magistrates’ Courts, sentence hearings are not transcribed into written documents and are only available in audio format to which we were not permitted access.

(4) *Offender’s social history.* Offenders’ social histories are key elements in explanations of sentencing decisions. For example, some research shows that poor health and substance abuse/misuse may mitigate sentences, as they may change judicial assessments of offenders’ level of culpability and future risk. Further, offenders with health problems may find prison especially difficult (Birmingham 2003; Allen 1987). The social cost of removing primary caregivers (usually mothers) from their families has been found to mitigate sentencing outcomes (Daly 1989). Further, childcare and employment may reduce the likelihood of imprisonment because these social factors are seen to exert a degree of informal social control over an offender’s life and therefore might operate to reduce the possibility of re-offending (Jeffries 2002a; Jeffries 2002b). For our analysis of the adult higher courts, we coded offenders’ childcare responsibilities, substance abuse history, employment, health statuses and past victimisation experiences. For the higher children’s courts, we also coded young offenders’ family structure and school attendance as indicators of informal social control in the lives of young defendants. Social history information was coded from the higher court sentencing transcripts and again not available at the Magistrate’s Court level.

## **Findings**

To explore the direct effect of Indigenous status on sentencing outcomes, we conduct our analyses in two stages. First, we examine the baseline differences between Indigenous and non-Indigenous defendants. Second, we report the results of logistic regression analyses, showing the main direct effects of Indigenous status on the imprisonment decision. Some variables were dropped from the analyses due to lack of variation. (With one exception due to its theoretical importance, variables with less than 5% were excluded).

### *Baseline Differences by Indigenous Status*

Tables 2 and 3 report the descriptive statistics for our adult lower court, higher adult and children's court samples. There were statistically significant differences in the proportion of Indigenous and non-Indigenous adult defendants who received a prison sentence in the lower (7.36% vs 2.49%) and higher (40.88% vs 34.92%) courts (see Table 2).

[INSERT TABLE 2 ABOUT HERE]

Further, as shown in Table 2, there are notable differences by Indigeneity in adult offender demographics, case and offending characteristics, offence contexts and social histories. More specifically in the higher adult courts, compared to non-Indigenous defendants, Indigenous offenders have significantly higher mean criminal history scores, are more likely to be on remand, to be identified as having offended with a degree of premeditation and are younger. Indigenous defendants are also significantly less likely to have entered a final plea of guilty, to be identified as employed, having childcare responsibilities, health problems and past victimisation experiences, and never identified as having taken a primary role in the offence, to have acted with co-offenders, or offended in a private location. Similarly, in the Magistrate's Courts, Indigenous defendants had significantly higher criminal histories scores, were more likely to be held on remand and less likely to have entered a final plea of guilty. Perceptually, these differences by Indigenous status may have negatively impacted on the three focal concerns (i.e. blameworthiness, risk, practical constraints/consequence) of judges in ways likely to aggravate Indigenous outcomes while and mitigating non-Indigenous ones. In other words, these differences in factors thought to influence sentencing may explain why the adult Indigenous defendants in this study were more likely to be incarcerated. This will be explored in the next section.

Unlike the adult courts, no significant differences by Indigenous status were found in the likelihood of incarceration in the higher children's courts, with 15.9% of Indigenous and 12.2% of non-Indigenous youth receiving detention. Nonetheless differences in other sentencing determinates were found. Compared to non-Indigenous youth, Indigenous defendants were more likely to be female, to have prior convictions noted and less likely to have pled guilty. Indigenous youth were also less likely to be identified as having offended

with a degree of premeditation (cf. adult higher court) and less likely to be identified as having an intact family.

[INSERT TABLE 3 ABOUT HERE]

### *Direct Effect of Indigenous Status*

Logistic regression analyses were used to estimate the separate direct impact of Indigenous status on incarceration (dependent variable) while controlling for other key sentencing determinates (independent variables) (see Tables 4 and 5). In the higher adult and children's courts, we controlled for offender demographics, case and offending characteristics, context of the offence and offenders' social history. In the adult lower courts, we controlled for offender demographics, case and offending characteristics.<sup>2</sup>

The results of logistic regression are reported as odds ratios which represent the separate impact of each variable, adjusted for the influence of the other independent variables. Odds ratios allow us to compare the likelihood of a prison sentence for two groups (e.g., Indigenous and non-Indigenous offenders). An odds ratio of 1 indicates that the likelihood of a decision to imprison is equally likely for both groups. An odds ratio of >1 implies that imprisonment is more likely in the first group, while an odds ratio of <1 indicates that it is less likely.

Table 4 summarises the logistic regression results of the *decision to imprison* in the adult higher and lower courts. In the higher courts, our analyses show that initial significant base-line differences between Indigenous and non-Indigenous defendants (i.e. the former are more likely to be imprisoned than the latter) disappear after adjusting for the other key sentencing determinates. In other words, when adult Indigenous and non-Indigenous defendants are sentenced in Queensland's higher courts under statistically similar circumstances, they are equally likely to be sentenced to prison. Further consistent with prior research, being on remand, having more extensive criminality (past and present) and being male significantly increased the probability of imprisonment, net of other factors. Inconsistent with prior research, pleading guilty at anytime during the process and childcare increased the odds of imprisonment. Although speculative, preliminary analyses of sentencing remarks in another jurisdiction suggest that it is not necessarily presence of a factor that matters as a mitigating circumstance, but the context in which mitigation is assessed. However, the unexpected effect

of final plea is requires further research, given legislation and anecdotal discussions with judges about how plea impacts on their decisions.

In contrast, after controlling for the other independent variables in our adult lower court model the higher likelihood of Indigenous imprisonment reduces but does not dissipate completely ( $p=0.054$ ). Indigenous defendants remain more likely to receive a prison sentence (see Table 4). Similar to our higher court analysis, the odds of imprisonment increased significantly for defendants on remand. Prior criminal history, offense serious and age significantly increased the chances of receiving a prison term. Not surprisingly, female defendants were less likely to receive a prison term, compared to male defendants in similar circumstances.

[INSERT TABLE 4 ABOUT HERE]

Recalled that in the children's' higher courts baseline data showed parity in the chances of detention by Indigenous status (see Table 3). As indicated in Table 5, this equality remained, after controlling for variables associated with offender characteristics, case/offending, offence context and social background. Thus, with all other sentencing factors being equal, Indigenous and non-Indigenous youth are equally likely to be sentenced to detention.

[INSERT TABLE 5 ABOUT HERE]

There are a number of other important predictors of a detention sentence for young offenders in the higher courts. Our results show that age is important: older youth are significantly more likely to receive a detention order than younger defendants, independent of other sentencing factors. As was the case in the adult courts, the presence of prior convictions (in the same category), higher current offence seriousness scores and being on remand, significantly increased the chances of detention. Overall, offence context and social history information did not have a significant effect on the likelihood of a detention sentence (cf. attending school, Table 5). Although this may reflect measurement issues, other research, in the adult higher courts in another jurisdiction, using different measurement of offence context and social history also found few significant effects of these variables on the decision to imprison (see Jeffries and Bond 2009).

## **Summary and Conclusion**

The current research explored the relationship between Indigeneity and the decision to incarcerate offenders in Queensland's lower adult, higher children's and adult courts. In the adult courts, Indigenous status initially had a direct impact on the decision to imprison with higher proportions of Indigenous versus non-Indigenous defendants receiving a prison. In contrast, Indigenous/non-Indigenous parity was found in the likelihood of detention in Queensland's higher children's courts. Once we controlled for other variables known to influence sentencing (e.g. current and past criminality), we found that: 1) in the adult lower courts, Indigenous sentencing disparity reduced but continued; 2) in the adult higher courts, Indigenous sentencing disparity dissipated completely; 3) in the higher children's court, sentencing parity by Indigenous status remained unchanged. Results from our adult court analyses thus provide support for both the negative discrimination (in the lower courts) and differential involvement (in the lower and higher courts) hypotheses.

Broadly speaking, the current research lends support to the focal concerns perspective of sentencing in that factors known to impact judicial perceptions of blame and risk were found to play a substantial role in sentencing in the lower adult, adult and children's higher courts. For example, defendants held on remand with serious past and present offending were significantly more likely to go to prison/be detained than those bailed with less momentous criminality. The focal concerns framework could also provide some explanation for our finding of negative discrimination against Indigenous defendants in the lower courts. In contrast to the higher courts, magistrates in the lower courts are especially time poor being required to make sentencing decisions quickly with minimal information about defendants. Under these conditions, arguable there may be greater judicial reliance on stereotypical attributions about offenders. For example, magistrates may attribute a higher degree of risk to Indigenous than non-Indigenous defendants, as perceptions of Indigenous peoples as 'deviant' are pervasive in Australian popular and governmental discourses (Cunneen, 2001: 91). This may, in turn, explain why adult Indigenous defendants are more likely to be sentenced to prison in the lower courts than comparable non-Indigenous offenders.

However, our finding of Indigenous/non-Indigenous sentencing disparity in the lower courts may be an artefact of our research design. In contrast to the higher court analyses, our



Magistrates Courts study included fewer control variables. For example, factors associated with offence context (e.g. role played by the defendant in the crime) and social background (e.g. health, substance abuse) may have impacted judicial focal concerns pertaining to blame, risk and practical constraints but we could not include these additional factors in our analyses. We cannot therefore ‘rule out’ the possibility that disparity in the likelihood of imprisonment might be explained by Indigenous differences in other unmeasured sentencing determinants. Indeed, in our higher court analyses where we were able to control of a wider range of sentencing factors, Indigenous/non-Indigenous sentencing parity was found.

Finding disparity by Indigenous status in lower court sentencing is obviously of some concern because it is suggestive of negative discrimination. Further, the fairness or justness of Indigenous/non-Indigenous sentencing equality at the higher court level (both adult and youth) could be also be debated. There are fundamental historic, political and economic differences between Indigenous and non-Indigenous people and to treat them equally may further add to Indigenous disadvantage. For example, in their narrative analysis of sentencing remarks in South Australia, Jeffries and Bond (2010) found that the underlying causes of Indigenous offending identified by judges mirrored broader social, political and populist discourses about Indigenous people. Surely under unequal circumstances ‘equitable’ rather than equal sentencing outcomes could be construed as the more ‘just’ response (Jeffries and Bond 2009).

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**Table 1. Description of Study Variables (Queensland, Lower Adult Courts, Higher Adult and Children's Courts, 2006-2008)**

<b>Variables</b>	<b>Description</b>
<i>Dependent variable</i>	
Sentence of imprisonment	0=no, not imprisoned; 1=yes, imprisoned.
<i>Independent variables</i>	
<u>Offender characteristics</u>	
Indigenous status	0=non-Indigenous; 1=Indigenous.
Sex	0=male; 1=female.
Age	At time of sentencing (in years).
<u>Case and offence characteristics</u>	
Prior criminal history (adult defendants)	Sum of standardised z scores of number of prior criminal convictions, number of prior criminal convictions in the same offence category as the current offence, and number of prior imprisonment terms.
Prior criminal history (youth defendants)	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Seriousness of principal offence	Reverse coded National Offence Index (NOI).
Convicted of multiple counts	0=no; 1=yes.
Entered a final plea of guilty	0=no; 1=yes.
On remand; On bail (adult defendants)	0=no; 1=yes (respectively). Refers to the last known in-custody status recorded in the adult court database before the date of the sentencing hearing. Reference category = summons.
On remand (youth defendants)	0=no, not mentioned by judge; 1=yes, mentioned by judge.
<i>The following variables relate only to the higher courts (adult and children's); this information was not available at the lower court level.</i>	
<u>Context of the Offence</u>	
Had an active/equal role	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Committed with co-offenders	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Occurred in a private place	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Evidence of premeditation	0=no, not mentioned by judge; 1=yes, mentioned by judge.
<u>Offender's Social Background</u>	
Employment status (adult defendants)	0=no, not mentioned by judge; 1=yes, mentioned by judge.
School attendance (youth defendants)	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Childcare responsibilities (adult defendants)	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Family structure (youth defendants)	0=no presence of an intact biological family mentioned by judge; 1=presence of an intact biological family mentioned by judge.
Poor health	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Substance use/abuse	0=no, not mentioned by judge; 1=yes, mentioned by judge.
Past victimisation experiences	0=no, not mentioned by judge; 1=yes, mentioned by judge.

**Table 2. Descriptive Statistics by Indigenous Status (Adult Criminal Courts, Queensland, 2006-2008)**

Measures	Lower Court				Higher Courts			
	Total	Indigenous	Non-Indigenous	Sig.	Total	Indigenous	Non-Indigenous	Sig.
% Indigenous	50.41	---	---		50.21	---	---	
% female	49.59	50.10	49.06	n.s.	48.26	49.32	47.19	n.s.
Mean age	30.24 (10.41)	29.96 (9.58)	30.52 (11.20)	n.s.	31.15 (9.96)	29.85 (9.04)	32.47 (10.66)	p<0.001
Mean prior criminal history index	-0.001 (0.996)	0.260 (1.233)	-0.267 (0.560)	p<0.001	0.007 (2.511)	0.581 (2.649)	-0.507 (2.263)	p<0.001
Mean seriousness principal offence	45.27 (31.54)	46.43 (33.32)	44.09 (29.60)	n.s.	98.36 (41.07)	100.31 (41.60)	96.38 (40.47)	n.s.
% with multiple conviction counts	8.76	7.36	10.19	n.s.	9.75	9.12	10.39	n.s.
% with plea of guilt	83.09	78.12	88.15	p<0.001	83.72	80.74	86.71	p<0.01
% on remand (last known)	3.51	5.11	1.87	p<0.01	10.01	15.37	4.6	p<0.001
% on released on bail (last known)	29.07	27.61	30.56	n.s.	34.44	33.61	35.26	n.s.
% occurred in private residence noted					10.52	0.00	21.12	p<0.001
% evidence of premeditation noted					12.38	22.97	1.70	p<0.001
% childcare responsibilities noted					9.67	0.17	19.25	p<0.001
% presence of employment noted					5.26	0.17	10.39	p<0.001
% poor health noted					6.53	0.17	12.95	p<0.001
% substance use/abuse noted					12.47	11.82	13.12	n.s.
% received a prison sentence	4.95	7.36	2.49	p<0.001	37.91	40.88	34.92	p<0.05
Number of cases	970	489	481		1,179	592	587	

Notes:

1. Means (and standard deviations in brackets) provided for continuous variables.
2. Recall that prior criminal history is measured as an additive standardised index. In the lower court: N=936 (total), N=473 (Indigenous), N=463 (non-Indigenous). In total, criminal history information was missing for 3.5% of lower court cases. In the higher courts: N=1,037 (total), N=490 (Indigenous), N=547 (non-Indigenous). In total, 12.04% of cases in the higher court were missing criminal history information.
3. T-tests or z-tests for equality between means or proportions (as appropriate) were used. To address the issues about the skewness of some continuous variables, Wilcoxon test of equality between median was calculated. The same pattern of results was found.
4. Recall some measures were not available for the lower court. Except for remand status, due to its theoretical importance, variables with <5% were dropped from the analysis.

**Table 3. Descriptive Statistics by Indigenous Status (Children's Courts, Queensland, 2006-2008)**

Measures	Total	Indigenous	Non-Indigenous	Sig.
% Indigenous	28.06	---	---	
% female	12.37	17.44	10.40	p<0.05
Mean age	16.75	16.86	16.70	n.s.
% prior convictions noted	30.50	36.92	28.00	p<0.05
% prior convictions (same category) noted	14.39	14.36	14.40	n.s.
Mean seriousness of principal offence	112.89 (33.99)	110.73 (35.18)	113.73 (33.51)	n.s.
% multiple conviction counts	9.35	7.69	10.00	n.s.
% plea of guilt	91.08	87.18	92.60	p<0.05
% on remand	23.31	25.64	22.40	n.s.
% occurred in private residence noted	10.65	9.74	11.00	n.s.
% active/equal role noted	52.66	47.18	54.80	p<0.10
% presence of co-offenders noted	29.50	29.74	29.40	n.s.
% evidence of premeditation noted	26.91	8.72	34.00	p<0.001
% intact family noted	13.09	4.62	16.40	p<0.001
% attending school noted	9.78	7.69	10.60	n.s.
% substance use/abuse noted	19.14	20.00	18.80	n.s.
% past victimisation experiences noted	8.06	9.74	7.40	n.s.
% received a sentence of detention	13.24	15.90	12.20	n.s.
Number of cases	695	195	500	

Notes:

1. Means (and standard deviations in brackets) provided for continuous variables.
2. T-tests or z-tests for equality between means or proportions (as appropriate) were used. To address the issues about the skewness of some continuous variables, Wilcoxon test of equality between median was calculated. The same pattern of results was found.
3. Recall variables with <5% were dropped from the analysis.

**Table 4. The Influence of Offender, Case and Processing Factors on the Decision to Imprison (Adult Criminal Courts, Queensland, 2006-2008)**

Measures	Lower Court		Higher Courts	
	b (s.e.)	O.R.	b (s.e.)	O.R.
Indigenous	0.730 (0.379) <sup>#</sup>	2.076	0.117 (0.160)	1.194
Female	-1.129 (0.396) <sup>**</sup>	0.324	-0.760 (0.153) <sup>***</sup>	0.468
Age	0.319 (0.146) <sup>*</sup>	1.376	0.027 (0.039)	1.027
Age <sup>2</sup>	-0.005 (0.002) <sup>*</sup>	0.995	-0.0004 (0.001)	1.000
Prior criminal history	0.344 (0.118) <sup>**</sup>	1.411	0.151 (0.032) <sup>***</sup>	1.162
Seriousness of principal offence	0.015 (0.004) <sup>**</sup>	1.015	0.011 (0.002) <sup>***</sup>	1.011
Multiple conviction counts	0.047 (0.525)	1.048	0.435 (0.214) <sup>*</sup>	1.546
Plea of guilt	---	---	0.628 (0.224) <sup>**</sup>	1.873
On remand (last known)	1.872 (0.502) <sup>***</sup>	6.499	0.761 (0.225) <sup>**</sup>	2.141
Released on bail (last known)	0.538 (0.363)	1.713	-0.276 (0.144) <sup>#</sup>	0.759
Occurred in private residence noted			0.043 (0.248)	1.044
Evidence of premeditation noted			0.126 (0.238)	1.134
Childcare responsibilities noted			0.702 (0.244) <sup>**</sup>	2.018
Presence of employment noted			-0.226 (0.309)	0.798
Poor health noted			0.223 (0.268)	1.250
Substance use/abuse noted			0.356 (0.208) <sup>#</sup>	1.427
Constant	-8.928 (2.309) <sup>***</sup>		-2.450 (0.694) <sup>***</sup>	
$\chi^2$ (d.f.)	88.24 (9)		171.53 (16)	
% correctly classified	95.26		70.06	
Number of cases	970		1,179	

<sup>#</sup> p<0.10 \* p<0.05 \*\* p<0.01 \*\*\* p<0.001

Notes:

1. The models were estimated with mean substitution for missing values for prior criminal history, and also estimated with 0 (no known priors) substituted for the missing values. In either case, the missing dummy indicator was not statistically significant, thus we report the models with mean substituted values but without the missing dummy.
2. In the lower court model, p=0.054 for estimated Indigenous coefficient.
3. In the lower court model, plea was dropped as there were no cases in which there was a plea of not guilty receiving a sentence of imprisonment. The higher court model excludes variables with <5% having the characteristic.



**Table 5. The Influence of Offender, Case and Processing Factors on the Decision to Imprison (Children's Courts, Queensland, 2006-2008)**

Measures	b (s.e.)	O.R.
Indigenous	0.285 (0.289)	1.329
Female	-1.222 (0.583)*	0.295
Age	1.184 (0.389)**	3.268
Age <sup>2</sup>	-0.023 (0.010)*	0.977
Prior convictions noted	-0.356 (0.366)	0.701
Prior convictions (same category) noted	0.937 (0.406)*	2.551
Seriousness of principal offence	0.013 (0.005)**	1.013
Multiple conviction counts	0.572 (0.378)	1.773
Plea of guilt	-0.046 (0.460)	0.955
On remand	2.020 (0.306)***	7.537
Occurred in private residence noted	-0.001 (0.437)	0.999
Active/equal role noted	-0.500 (0.359)	0.607
Presence of co-offenders noted	0.151 (0.320)	1.163
Evidence of premeditation noted	-0.162 (0.358)	0.850
Intact family noted	-0.485 (0.469)	0.616
Attending school noted	-1.489 (0.785) <sup>#</sup>	0.226
Substance use/abuse noted	-0.017 (0.313)	0.983
Past victimisation experiences noted	-0.214 (0.458)	0.807
Constant	-17.243 (4.070)***	
$\chi^2$ (d.f.)	106.63 (18)***	
% correctly classified	87.34	
Number of cases	695	

# p<0.10 \* p<0.05 \*\* p<0.01 \*\*\* p<0.001

Notes:

1. Recall variables with <5% having the characteristic were dropped from the model.

<sup>1</sup> By principal offence, we mean the offence that received the highest sentencing penalty, with prison being the highest. If two offences received the same penalty, the offence with the highest statutorily-defined penalty is the principal offence. If the charges are the same, the first charge is recorded as the principal offence. This definition is derived from the South Australian Office of Crime Statistics and Research.

<sup>2</sup> Our models cannot account for selection bias as we do not have the information to do so. Selection bias refers to the accumulation of criminal justice decisions such that not all offenders would face the same risk of facing a sentencing decision.